Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. 78-298

MARY W. ALLEN,
Petitioner,

v.

ATLANTIC NATIONAL BANK,
L.E. WILLIS, TRUSTEE,
and
WALTER H. RIDDICK, SR., TRUSTEE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION TO DISMISS APPEAL

Atlantic National Bank and the other named respondents herein respectfully move the Court for dismissal of the Petition for a Writ of Certiorari on the ground that this Court lacks jurisdiction as asserted in Petitioner's brief, jurisdiction being sought under 28 U.S.C.A., §1257(3).

I

ARGUMENT IN SUPPORT OF MOTION

The aforementioned statute on which Petitioner relies, to-wit, 28 U.S.C.A., §1257(3), reads as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "3. By Writ of Certiorari where the validity of a treaty or statute is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaty or statute of, or commission held or authority exercised under the United States. June 24, 1948(c) 646, 62 Stat. 929."

Under 28 U.S.C.A. §1257, the Supreme Court of the United States may review the final judgment rendered by the highest Court of a State on appeal when the judgment or decree draws into "question the validity of a treaty or statute of the United States and the decision is against its validity." The case at bar does not contest the validity of a treaty or statute. Just the opposite, the Petitioner wants to take 15 U.S.C.A. §1635 and §1603 on its face and say, "The bank loan was not for a business purpose." This is a question of fact for the trier of fact to decide - not a question of law.

II

Neither side in the case at bar wishes to contest the validity of 15 U.S.C.A. §1635 and §1603. Rather, the Petitioner seeks to use 15 U.S.C.A. §1635 as the means of avoiding repayment of the loan to said Bank. It is crystal clear from a reading of the Petitioner's brief that the validity of Title 15 U.S.C.A. §1602, et seq., has never been drawn into question in the proceedings prior to the filing of this Petition by either the Petitioner or the Respondents. The sole question submitted in the lower Court and in this Court by Petitioner's brief is whether or not the transactions involved the extension of credit for business or commercial purposes, in which event there is no right of rescission under Title 15 U.S.C.A. §1603, as the statute provides that credit transactions for business or commercial purposes are specifically exempt. Even under the most charitable interpretation of the Petitioner's brief one is unable to find where either of the parties, at this stage or at any other stage, raised the question of the validity of the statute hereinabove referred to and those referred to in Petitioner's brief. This Court has held in a long line of cases that the validity of a statute or treaty of the United States was not "drawn into question", under the meaning of Title 28, U.S.C.A. §1257(3) or under former statutes setting forth similar jurisdictional requirements every time rights claimed under a treaty or statute were controverted, nor was the validity of an authority every time an act done by such authority was disputed. Baltimore, etc. R. Company v. Hopkins, District Col. 1889, 9 S. Ct. 503, 130 U.S. 210, 32 L. Ed.; Kennard v. Nebraska, 130 U.S. 210, 46 L. Ed.

1175; Cook County v. Calumet & C. Canal & Dock Co., 138 U.S. 635, 34 L. Ed. 1110; Sevier v. Haskell, 14 Wall 12, 20 L. Ed. 827; Steines v. Franklin County, 14 Wall 15, 20 L. Ed. 846.

The Court should also refuse to take jurisdiction in this matter because there is no conflict of interpretation between United States Circuit Court of Appeal. The Court should also refuse to take jurisdiction because there is no conflict between State and Federal law. The Court should also refuse to take jurisdiction because neither side has called into question a violation of the United States Constitution.

This is the classic case of using the mere mention of the word "Federal" to get jurisdiction in the United States Court system. The Supreme Court has made it patently clear no Writs of Certiorari will be granted on appeal from the highest State Court unless there is a question as to the validity of a Federal law. Petitioners have never questioned the validity of 15 U.S.C.A. §1635 and §1603 from the inception, nor did the Respondents.

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STATEMENT OF PRIOR PROCEEDINGS

The Appellant's statement of prior proceedings in the lower Court is substantially correct.

QUESTIONS PRESENTED

1. Did the lower Court err in holding that Atlantic National Bank did not violate the Truth in Lending Act?

STATEMENT OF FACTS

In order to have a full and complete understanding of the transaction which was the subject of this suit, it is necessary to examine the "temper of the times" in which this transaction was entered.

Mary W. Allen, the appellant herein, had a son, Norman S. Allen, who along with another man named J. J. Goodman operated an unincorporated business named Trustee Security Development Company. Allen and Goodman were equal partners in the business.

A scheme was developed by the Goodman and Allen firm whereby they would persuade persons who had built up cash value in ordinary whole life insurance policies to cash in those policies, purchase decreasing term life insurance from Goodman and Allen, and turn over the balance of the cash value received from the sale of the whole life policy to Trustee Security for investment purposes. The alleged investments which Trustee Security made on behalf of its "clients" included a supposed purchase of land in Beech Mountain, North Carolina from a concern known as Carolina Caribbean Corporation, a scheme which ultimately resulted in Norman Allen's felony conviction for obtaining money under false pretenses.

In order to finance their business ventures, Goodman and Allen had borrowed money from many concerns, including the appellee, Atlantic National Bank.

In October of 1974, Allen was in deep financial difficulty. Not only was

he in default for certain loans he had taken out for the business, and unable to keep his commitments with Carolina Caribbean, but he was also being threatened with criminal prosecution because of dealings he had made concerning a 34 foot boat which he had "double-financed". It seems that when Allen purchased the boat, he did so through Citizens Trust Bank of Portsmouth, Virginia, giving a purchase money security interest in the boat to that institution. Later, Allen financed the same boat again through General Electric Credit Corporation which thought it was obtaining a first lien on the boat. When General Electric found out otherwise, it demanded the total amount due from Allen to pay off the boat.

Allen, realizing the desperate straits in which he found himself, went to Atlantic National Bank, with which firm he and his partner trading as Trustee Security already had several outstanding loans, and asked to borrow more money to pay off the GECC boat loan. Atlantic National Bank, which had already loaned Allen a great deal of money, refused to make any new loans unless the new loan and the prior indebtedness of American Leasing and Trustee Security were adequately collateralized, American Leasing being another business concern of Allen and Goodman.

Allen, himself, had no such collateral but asked his mother to encumber 12 lots, including two which contained her personal residence, to secure the loan to her son. The loan was made to Allen and the property was put up as collateral. The Bank at that time, at

the special instance and request of Norman Allen, who was to be making the payments on the loan, set forth an agreement by the terms of which Mrs. Allen could redeem her residence and two adjoining lots in case of Norman's default, upon the payment of $37,000.00 to Atlantic National Bank.

Norman Allen indeed defaulted on the loan. Atlantic National Bank took steps to foreclose on its security. It offered to accept $37,000.00 in accordance with the agreement reached between the parties, and release the residence and two adjoining lots, but Mrs. Allen could not or would not come forth with the funds, so the property was sold.

The Trial Court held that the Federal Truth in Lending Act had not been violated by Atlantic National Bank failing to disclose the right to rescind to the appellant, inasmuch as the transaction involved herein involved funds to be used for a business purpose and under the Federal Truth in Lending Statutes the right to rescind need not be disclosed for a business transaction.

ARGUMENT

I. THE COURT DID NOT ERR IN HOLDING THAT MARY W. ALLEN WAS NOT ENTITLED TO A NOTICE OF A RIGHT TO RESCIND UNDER THE TRUTH IN LENDING ACT INASMUCH AS THE TRANSACTION INVOLVED HEREIN WAS OF A BUSINESS NATURE.

The basic issue at hand and indeed the only issue is whether or not this transaction was a loan made for business or commercial purposes.

In her brief, appellant has quoted several sections of the Truth in Lending Act. Title 15 USCA §1603, entitled Exempted Transactions states as follows:

> "This subchapter (to-wit: The Truth in Lending Act) does not apply to the following: (1) credit transactions involving extensions of credit for business or commercial purposes..."

Thus, in order for the Truth in Lending Act to apply, the transaction involved must be a consumer credit transaction, to-wit: one for which the funds of the subject transaction were used primarily for personal, family, household or agricultural purposes. See 15 USCA §1602. Business transactions clearly do not fall within the coverage of the Act.

Appellant's own evidence is overwhelming that the loan was made for the benefit of Norman Allen, J. J. Goodman, Trustee Security Development Company and American Leasing. The appellant's own evidence established this. See testimony of Charles Reynolds, (Record at page 111). See also the testimony of Norman S. Allen wherein he stated that the discussions concerning the loan which is the subject of this suit concerned all his loans at the Bank, to-wit those prior loans which had been incurred as a result of his business. (R. 238 thru 240, et seq.)

Appellant introduced at trial Exhibit 15, a Memo to the Credit File in reference to Norman Allen which makes it clear that the Bank recognized the

obligations incurred on October 15, 1974 concerning Norman Allen as business transactions. The memo states, "Discussed with Norman Allen his total debt under the name of Trustee Security, Mary W. Allen, Garland Brown and American Leasing." (See Exhibit 15).

The memo went on to say that Norman Allen would make the obligation current. Trustee Security and American Leasing were business enterprises of Norman Allen. Consequently, appellant in her own evidence established the nature of the loan as commercial and for business purposes. Additionally, the deed of trust introduced at trial clearly states that it was to secure the notes of Trustee Security and American Leasing among others. (See Exhibit E).

In the record of the April 1977 hearing, starting at page 180, Mrs. Allen states that to the best of her knowledge the money obtained in this transaction was put into Trustee Security and the funds were used to keep the business going in October 1974.

As an indication of the record of the appellant's testimony indicates, the April hearing was the second time she had stated under oath that the funds procured by the loan were to be used for business purposes. The first time was at the felony trial of her son in the Circuit Court of Virginia Beach. Id.

By the rules set forth in the landmark case of Massie v. Firmstone, 134 Va. 450 (1922), a party cannot rise above her own testimony. Therefore, inasmuch

as Mrs. Allen admitted in the trial that the loan was for business purposes, she cannot now rise above her own testimony and allege that the transaction was not of a business nature.

The overwhelming weight of the evidence presented by the defendants at trial establish the transaction involved herein was of a business nature. The documents themselves reflect the business nature of the transaction. The deed of trust introduced as Exhibit E indicates that it was given to secure the business indebtedness of Norman Allen and J. J. Goodman for Trustee Security and American Leasing. Also, Exhibit L, the Consent to Pledge, which was signed by Mrs. Allen, gave as her address the business office of Trustee Security. (See Record at page 80).

As the testimony indicated, part of the money from the loan secured by the deed of trust in question was given to Norman Allen. (R. 63). Allen stated that he cashed the check, (R. 64) and cannot remember exactly where the money from the loan went. (R. 63). At the time in question, Allen's account had been closed out at Atlantic National Bank but he had gone back to said Bank and surreptitiously opend up a business account in the name of "RP". (R. 103). RP and Trustee Security, the business of Norman Allen, were one and the same. (R. 67). In fact, payment of property taxes on the secured property were paid out of the "RP" account to Mrs. Allen by Norman. (R. 73).

The evidence indicates that $28,000.00 was paid to Charles Moss, the

attorney of the appellant and her son Norman out of the loan proceeds, of which sum $23,000.00 went to pay off the double-financing of Norman's 34 foot yacht and $5,000.00 deposited in Norman's business account entitled "RP". (Exhibits F, G, H, & I) (R. 63, 68).

The testimony of the officers and agent of Atlantic National Bank who handled this transaction indicates that the loan was clearly of a business nature. The Bank's President stated clearly that the nature of the loan was that of a "wrap-around" transaction whereby Mrs. Allen's property would be used to secure the present indebtedness of Trustee Security with Atlantic National as well as the newer obligations, to-wit: The $5,000.00 cash paid to Norman Allen and the $23,000.00 paid on his behalf to GECC to pay off the loan on the yacht which Allen had "double-financed", said boat having been purchased by Norman Allen for use in his business to sell property in North Carolina. (See Record at 108, 110).

Oliver Harrell, the loan officer who closed the loan, stated without hesitation that he gave no disclosure of right to rescind under the Federal Truth in Lending Act because this was clearly a business transaction. (R. 161). Consequently, it is clear that the overwhelming weight of evidence, both documentary and circumstantially, and by testimony establishes that this was a business transaction. Indeed, as previously stated, appellant's own testimony establishes that fact.

Counsel for the appellant sets forth certain cases which he states stands for the proposition that Mrs. Allen should have the right of rescission in this case. It should be noted, however, that those cases are clearly distinguishable from the factual situation with which the Court was confronted here. Each of those cases dealt with a loan which was made to a consumer for home improvements, and was, in fact, used by the consumer to either build or improve his home.

None of those facts exist in this case, inasmuch as the money lent was admittedly not to Mary Allen for her purposes but to Norman Allen, the true party in interest, for his business purposes.

In the case of Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (D.C. La. 1971), aff'd per curiam, 450 F. 2d 941 (5th Cir. 1971), the Court was confronted with the exact question with which we are confronted here, that question being whether or not a particular transaction is exempted from the Truth in Lending Act by virtue of its being commercial in nature. In the Dreyco case, supra, the plaintiffs owned an apartment building in New Orleans. After falling behind in their payments on that building the plaintiffs executed a mortgage on their personal residence. That mortgage was given to the creditor to prevent its foreclosure on the apartment building. The mortgage was of a"wrap-around" nature quite similar to that given by Mrs. Allen in this case.

The plaintiffs in the Dreyco case later moved the Court for rescission under the Federal Truth in Lending Act inasmuch as the defendants allegedly did not comply with the disclosure provisions of the Act. The Dreyco Court held for the defendants on the basis that the Truth in Lending Act specifically exempts credit transactions involving extension of credit for business or commercial purposes.

The Court in reaching its decision set forth the following test:

> "In determing whether a particular transaction is exempt, therefore, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. Thus, in the instant case, the extension of credit was for a business purpose and §1635 (a) is of no avail to the plaintiffs even though the mortgage was placed on their residence." Id. at 874.

This text was also followed by the Unites States District Court for the State of South Carolina in the case of Puckett v. Georgia Homes, Inc., 369 F. Supp. 614 (D.S.C. 1974). In that case the purchaser of a mobile home moved for damages under the Truth in Lending Act for the alleged failure of the seller to make proper credit disclosures in connection with the mobile home transaction.

The Court held for the defendant on the basis that the purchased trailer was intended for rental purposes to supplement the purchaser's income from his regular employment and therefore was for business purposes and was exempt from the credit disclosure provisions of the Truth in Lending Act.

In the Puckett case, the Court referred to and cited with approval the decision in Dreyco.

Consequently, it is submitted that from the appellant's own testimony, and the overwhelming weight of the evidence, the funds used in this case were for the benefit of Norman Allen and his business transactions. Applying the approved test of the Dreyco case to the evidence, the Truth in Lending Act clearly does not apply and there was no duty upon Atlantic National Bank to give any notice of any right to rescission or make any disclosures required for a consumer transaction under 15 USCA §1601, et seq.

Clearly, Congress in enacting the Truth in Lending Act, 15 USCA §1601, et seq. never intended to entrap a lending institution in matters of this type. The purpose of the statute was to assure that a consumer debtor was made aware of the costs of obtaining credit. See e.g. W. T. Grant Co. v. C. I. R., §483 F. 2d 115 (2d Cir. 1973), not to deviously set traps by which windfalls could be reaped. Andrucci v. Gimbel Bros., Inc., 365 F. Supp. 1240 (1973). To allow recovery under the Truth in Lending Act under the circumstances in this case would clearly violate not only

the statute itself which expressly excludes business transactions from coverage, but also defeat the Congressional intent in enacting it. Id. (See also 15 USCA §1601 and §1603).

No substantial Federal question is involved in this controversy. Petitioner does not allege conflict in the various Circuits. Equally certain is that there is no allegation in Petitioner's Brief that the validity of the Statute involved herein has been drawn into question.

CONCLUSION

The Courts below have correctly interpreted the facts as applied to the Statute under which Petitioner seeks relief. The Petition and supporting record reflect the classic case of a mother willing to make the ultimate sacrifice, if need be, to rescue her wayward son in his ill-fated business ventures and nothing more.

This Honorable Court should dismiss the Petition for the reasons stated herein and Dismissal is respectfully requested.

Respectfully submitted,

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